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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

-against-

MAZIE LANCASTER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the Appellate Division of the Supreme Court of the State of New York, Second Department

MARTIN S. FRIEDMAN, ESQ., on behalf of the Petitioner Mazie Lancaster, prays that a Writ of Certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York entered on the above case on the 31st day of May, 1972 and the denial of permission to appeal made by the Hon. Adrian P. Burke of the Court of Appeals of the State of New York entered on the 21st day of August, 1972.

OPINIONS BELOW

The order of the County Court of the County of Westchester, State of New York (Hon. Leonard J. Rubenfeld, J.) dated the 29th day of October, 1968, and not yet reported, is set forth in the Appendix hereto at page A1.

The opinion of the County Court of the County of Westchester, State of New York (Hon. Leonard J. Rubenfeld, J.) dated the 2nd day of April, 1969, and not yet reported, is set forth in the Appendix hereto at page A4.

The opinion of the County Court of the County of Westchester (Hon. George Beisheim, Jr., J.) dated the 15th day of May, 1970 and not yet reported, is set forth in the Appendix hereto at page A26.

The order of the County Court of the County of Westchester (Hon. George Beisheim, Jr., J.) dated the 8th day of September, 1971 and not yet reported, is set forth in the Appendix hereto at page A13.

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York, Second Department dated the 31st day of May, 1972 and not yet reported, is set forth in the Appendix hereto at pages A30-A33.

The Order of Denial of Permission to appeal to the Court of Appeals of the State of New York dated the 21st day of August, 1972 and not yet reported is set forth in the Appendix hereto at page A36.

The order of the Appellate Division of the Supreme Court of

the State of New York, Second Department dated the 27th day of September, 1972 and not yet reported, is set forth in the Appendix hereto at page A37.

The certificate of the Appellate Division of the Supreme Court of the State of New York, Second Department dated the 27th day of September, 1972 and not yet reported, is set forth in the Appendix hereto at page A38.

JURISDICTION

The order of the Court of Appeals of the State of New York denying petitioner permission to appeal to the Court of Appeals made and entered on the 21st day of August, 1972 and the order of the Appellate Division, Second Judicial Department dated the 31st day of May, 1972, copies of which are appended to this petition. The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

QUESTIONS PRESENTED

1. Was there probable cause for the issuance of the search warrant within the meaning of the United States Constitution?

2. Was there probable cause for the search and the arrest of the petitioner within the meaning of the Fourth Amendment to the United States Constitution?

3. Was the evidence used in the court below illegally obtained within the meaning of the Fourth Amendment to the United States Constitution?

4. Was the oral admission obtained in violation of the Fifth

Amendment to the United States Constitution?

5. Did the petitioner have a fair trial in the court below within the meaning and scope of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved in the determination of this case are:

(a) The Fourth Amendment which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(b) The Fifth Amendment which states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

(c) The Fourteenth Amendment (Section 1) which states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On February 2, 1968, the petitioner, Mazie Lancaster, was arrested in the City of White Plains pursuant to a search warrant (R.A. 109A) and charged with advancing and profiting from unlawful gambling activity as a felony and as a misdemeanor and possession of gambling records as a felony and misdemeanor. A motion was made for an order suppressing evidence, granting a hearing and directing return of evidence seized (R.A. 134A-136A) which was granted to the extent that a hearing be had to determine the manner of execution of search warrant and the validity of the search (R.A. 131-133A). The petitioner was prohibited by Court ruling from inquiring into probable cause for the issuance of the search warrant (R.A. 3-5). Testimony was then taken (R.A. 5-30l). The motion was denied in an opinion by the Hon. Leonard Rubenfeld, J. contained in the appendix hereto at page A4.

Police officers entered the premises subject to search. When requested by petitioner to show their authority, they refused to show the same until they determined who was "in charge of the premises." The court below held (Hon. George Beisheim, Jr., J.) in an opinion contained in the appendix at page A11 that the petitioner had no right to look at or read the search warrant unless she had some authority in the premises and the officer

had the perfect right to ask who was in charge before letting her read the warrant (R.A. 307-382). Thereafter, petitioner allegedly answered "I'm in charge of these premises." (R.A. 325-327) This alleged admission was used to connect petitioner with contraband found on the premises and as an admission of guilt.

In addition, prior to the commencement of the selection of the jury, conferences were had with the Court with respect to the voir dire of the jurors and thereafter, instructions given to the panel. The stenographic minutes of that conference and the instructions given to the panel on the voir dire are missing and were the subject of a motion for summary reversal (R.A. 68A) and a motion settling the record (R.A. 5-26A). The Court below in essence found that the missing minutes contained no errors in an opinion which is contained in the appendix at page A30.

The trial record is encompassed in the Record on Appeal, pages 388 to 1197. The conduct of the Trial Court in charging the jury and in marshalling the evidence, as well as the conduct of the prosecutor, tended to deprecate the defense, prejudice the petitioner and otherwise prevent a fair trial.

Appeal was taken to the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Department which Court affirmed the jury's verdict below by a vote of three to two with a dissenting opinion which is contained in the appendix annexed hereto on page A30.

Thereafter application was made for permission to appeal to the Court of Appeals of the State of New York which permission was denied. The order of denial is contained in the appendix hereto on page A36.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the decisions of this Court in the area of illegal search and seizure, self-incrimination and due process of law.

The Fourth Amendment to the United States Constitution provides that "... no warrant issue but upon probable cause...".

The affidavit of the Deputy Sheriff (R.A. 111A-118A) credits no confidential informer, no observation of contraband, no observation of illegal conduct, no observation of the petitioner, people making purchases and the absence of children entering the store even though school was open and the officer made his observations during school hours on school days when school children could not patronize a candy store (R.A. 59, 78, 80, 86, 88). Moreover, the premises were actually two separate premises, one named in the warrant and one unnamed (R.A. 144-146). These observations and testimony do not establish the probable cause required by this Court as indicated in *Dumbra v. United States*, 268 U.S. 435, 45 S.Ct. 546, *Henry v. United States*, 361 U.S. 98, *Wong Sun v. United States*, 83 S.Ct. 407, *Mapp v. Obio*, 81 S.Ct. 1684, *Spinelli v. United States*, 89 S.Ct. 584.

Furthermore, evidence adduced at the suppression hearing (R.A. 1-299) and acquired after the search was well under way was used by the Court below (opinion Hon. Leonard J. Rubenfeld, J., appendix page A4) to establish the validity of the search as well as the warrant. This is clearly contrary to the position of this Court as established in *United States vs. DiRie*, 332 U.S. 581, 60 S.Ct. 222, *Vale v. Louisiana*, 90 S.Ct. 1969, 399 U.S. 30 and violative of the Fourth Amendment to the United States Constitution.

The order of Hon. Leonard J. Rubenfeld, J. on October 29, 1968 (appendix page A1) prohibiting petitioner from examining into probable cause for the issuance of the search warrant herein is contrary to the position taken by this Court in *Jones vs. United States*, 362 U.S. 257 establishing the principal that a defendant has an absolute right to inquire into the legality and constitutionality of the procurement of evidence sought to be used against her.

The Court below also failed to construe the Fifth Amendment to the United States Constitution as delineated by this Court in *Miranda vs. Arizona*, 384 U.S. 486, *Matbias v. United States*, 391 U.S. 1, 88 S.Ct. 1053, *Benton vs. Maryland*, 89 S.Ct. 2056 and *Orozco vs. Texas*, 89 S.Ct. 1095.

The test established by this Court is as follows:

1. Was the defendant in custody or otherwise deprived of her freedom of action in any significant way.

2. If defendant was deprived of her freedom of action in any significant way, was she given the following warnings as to her rights and prior to any interrogation,

    1. Was she told that she had a right to remain silent?

    2. Was she told that any statement she might make may be used as evidence against her?

    3. Was she told that she had a right as to presence of an attorney?

    4. Was she told that if she could not afford an attorney she could have one without cost and prior to questioning?

The testimony of the police officers (R.A. 319-323) estab-

lished without contradiction that the petitioner was deprived of her freedom of action in a significant way, was not advised of her rights pursuant to *Miranda vs. Arizona* (supra) until the search was substantially completed and was interrogated with the specific intent of securing an admission by means of official coercion. (See dissenting opinion, Appellate Division of the Supreme Court, Second Department, appendix page A30). Under the circumstances, the petitioner was deprived of her rights under the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment.

Moreover, the multitude of errors committed, the loss of stenographic minutes, the prejudicial conduct of the prosecuting officer and the Court all combined to deprive the petitioner of due process and a fair trial as required by the Fourteenth Amendment to the United States Constitution as did the order of the Hon. Leonard J. Rubenfeld forbidding the examination into probable cause for the issuance of the search warrant herein (appendix page A1).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARTIN S. FRIEDMAN
Counsel for Petitioner
Mazie Lancaster

APPENDIX "A"

At a Special Term of Part II of the County Court held in and for the County of Westchester, at the County Court House in the City of White Plains, New York, on the 29th day of October, 1968

PRESENT:
HON. LEONARD RUBENFELD
County Judge of Westchester County

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

-against-

MAZIE LANCASTER

Defendant

The defendant having moved this Court for an Order suppressing and directing the return of evidence seized in the within matter upon the ground that the arrest, search and seizure of the defendant was not duly authorized by law and the evidence seized thereby seized contrary to law and in violation of the defendant's rights under the Constitution and

Statutes of the United States of America, and the State of New York and for an Order pursuant to Section 807 of the Code of Criminal Procedure providing that a hearing be had to determine the validity of the issuance and execution of the search warrant in the instant matter and for an Order suppressing the evidence seized upon the grounds that the search warrant was issued without probable cause and the evidence thereby seized, seized contrary to law and said motion having duly come on before this Court to be heard:

NOW, upon reading and filing of the Notice of Motion dated the 31st day of July, 1968, the affidavit of MAZIE LANCASTER duly verified the 31st day of July, 1968, the affirmation of Martin S. Friedman, Esq. dated the 31st day of July, 1968, the reply affidavit of Martin S. Friedman, Esq., verified the 4th day of September 1968, all in support of said motion together with a Memorandum of Law and the affidavit of Joseph W. Rakacky, Esq. Assistant District Attorney of the County of Westchester, sworn to the 29th day of August, 1968, in opposition thereto, and the matter having been fully submitted and due deliberation having been had thereof and the Court having rendered its written decision.

NOW, on motion of Martin S. Friedman, Esq., Attorney for defendant, it is hereby

ORDERED that the motion be in the same and hereby is granted to the extent that a hearing to determine the manner in which the search warrant was executed and to determine the validity of the search of the defendant, is ordered and it is further

ORDERED that the hearing be had at Part II of the COUNTY COURT on the 18th day of November, 1968.

ENTER

HON. LEONARD RUBENFELD

County Judge of Westchester County

APPENDIX "B" – Opinion Dated April 2, 1969 by Judge Rubenfeld

(SAME TITLE)

RUBENFELD, J.

Defendant moves to suppress evidence on the grounds that the evidence was seized under color of a search warrant issued without a sufficient showing of probable cause; on the grounds that part of the evidence was seized from premises located at a different street number than that stated in the warrant; and on the grounds that a search of defendant's person was unauthorized since she was not named or described in the warrant.

The motion is denied in all respects.

The search warrant was issued on February 1, 1968, upon the affidavit of an investigator from the Westchester County Sheriff's Office. The affidavit showed that on December 20, 1967, during a period of two hours, approximately 25 adults were observed entering and leaving the premises of the Texas Candy Store at 108 Brookfield Street in White Plains. None of these adults appeared to be carrying items of purchase upon their departure and no children were observed entering the candy store. In the light of his 19 years of experience in gambling investigations, this combination of circumstances was an indication to the affiant that a policy operation was being conducted in the candy store and the store was placed under surveillance on two additional days.

On January 16, 1968, during the hours of 9:45 A.M. to

12:30 P.M. 35 adults were observed entering and leaving the store with no purchases visible and no children were observed entering the premises. Three of the persons entering the store had prior records of arrests or convictions for policy. Again, on January 31, 1968, during a period of two hours, 28 adults were observed entering and leaving the store without any purchases visible and no children were observed entering the store. Three of these persons had prior records involving arrests or convictions for policy, and one of these, convicted in 1967, was observed entering and leaving the store on five different occasions during the two-hour period. In addition, the affidavit showed that numerous gambling arrests had previously been made on these premises.

The facts set forth in the affidavit, particularly when supplemented by the expert knowledge of an experienced investigator (*cf. United States v. Lewis*, 392 F. 2d 377 (2d Cir. 1968); *People v. Valentine*, 17 N.Y. 2d 128; *People v. Marshall*, 13 N.Y. 2d 28), provided the judge who issued the warrant with proof from which he could reasonably find a sufficient showing of probable cause (*People v. Fino*, 14 N.Y. 2d 160, 163). Although there was no direct observation of an illegal transaction, probable cause may be based entirely upon circumstantial evidence (see *e.g. United States v. Nicholson*, 303 F. 2d 330, 331 (6th Cir. 1962); *Clay v. United States* 246 F.2d 298 (5th Cir. 1957) *cert. denied*, 355 U.S. 863 (1957); *Rossitto v. State of Delaware*, 234 A. 2d 439 (1967) and in a close case, the validity of the warrant will be upheld (*United States v. Ventresca*, 380 U.S. 102, 108-109 (1965); *People v. Alfinito*, 16 N.Y. 2d 181; 186; *People v. Rogers*, 15 N.Y. 2d 422, 425).

With respect to the lawfulness of the search of this

defendant – who was in the Texas Candy Store when those premises were searched – the warrant recites that evidence of the policy operation may be obtained by "making a search of the premises located at 108 Brookfield Street, City of White Plains, New York, known as the Texas Candy Store, and apertures leading from said premises to other attachments, to wit, basement of house, to which entrance is accessible from store." The warrant then commands "a search of said premises located at 108 Brookfield Street, in the City of White Plains, New York, and the person of William Jones, owner of said premises, and of Thomas Burton, an employee of said premises, and persons present on said premises...."

Nowhere in the warrant, or in the affidavit supporting the warrant, is the defendant named or described except by the catchall phrase: "and persons present on said premises." The law is reasonably clear, however, that an authorization to search a designated premises does not imply a right to search any persons who happen to be on the premises, and a valid warrant to search some person on the premises must contain the name or an adequate description of the particular person to be searched (Code of Crim. Proc. §793, *cf., People v. Smith,* 21 N.Y. 2d 698, 700; *United States v. Di Re* 332 U.S. 581, 587 (1948); *United States v. Festa,* 192 F. Supp. 160, 163 (D. Mass. 1960). "Persons present on said premises" is not an adequate description of the defendant under the circumstances of this case (cf., *People v. Brown,* 40 Misc. 2d 35, 43). The lawfulness of the search of the defendant depends, therefore, on whether the search was made incident to a lawful arrest, and a hearing was ordered to determine that issue and to determine whether the police searched an area larger than that described in the warrant.

At the hearing which was concluded on March 4, 1969, it was shown, through a photograph submitted by the defendant, that the Texas Candy Store at 108 Brookfield Street appears from the outside to be contained in a one-store, brick, rectangular building with a frontage of less than 20 feet and extending back about 40 feet. Prosecution witnesses testified that on February 2, 1968, a search party of eight officers entered through the front door of the candy store and found it occupied by the defendant, who was seated with her coat off at a table and holding a telephone; and one Charles Redd, a witness for the defendant. Upon entry by the search party, the defendant asked what was going on. Lieutenant Bernard Seit of the White Plains Police Department told her they had a warrant to conduct a search. The defendant asked to see the warrant. Lieutenant Seit asked if she was in charge and the defendant said that she was. The warrant was given to her and she read it and then she pointed out that she was not named in the warrant.

In the meanwhile, various officers in the party began to search the interior of the brick building and found, in a niche in the wall some five or six feet from the defendant, a policy slip containing 124 plays. Other officers proceeded through an open door in the left wall of the building to a hallway where, in the ceiling just beyond the doorway, a small manilla pay envelope containing three policy slips was found. Another seven such envelopes containing numerous policy slips and plays were found several feet from the door on the right side of the hallway in a small closet at the bottom of some stairs leading to a locked door. An additional envelope was found either in the same closet or in a boiler room reached by going through an open door at the end of the hallway into a room with a table and chairs and then through a second open door

of that room to the furnace. The boiler room, in turn, had another door leading to a sub-basement which was not entered.

Defendant maintains that the police lacked authority to search the hallway and boiler room area because those structures are a part of 114 Brookfield Street and are not a part of 108 Brookfield Street. From outside the premises it does, in fact, appear that 114 Brookfield Street consists of a two or three-family house separate from and having no connection with the candy store at 108 Brookfield Street except that the house and store share a common wall. Nevertheless, defendant's argument must fail. As previously indicated, there is an open door in that common wall which connects the "store proper" to the "hallway area" which forms a part of the basement of the structure at No. 114. Witnesses for the prosecution testified, and the Court so finds, that this area was part of the Texas Candy Store; that the only exit from this area was through the store; and that the manager (one Thomas Burton, who is named in the warrant) had been observed working in that area on a previous occasion. The search warrant particularly describes this hallway area as the "apertures leading from said premises (the Texas Candy Store at No. 108) to other attachments; to wit, basement of house, to which entrance is accessible from store." The command portion of the warrant does not repeat all of the descriptive details, but a commonsense, rather than hypertechnical, reading of the warrant, shows that a search of this area was authorized (*cf. People v. De Lago,* 16 N.Y. 2d 289, *cert. denied.* 383 U.S. 963 (196).

Even without these details in the warrant, a search of the entire premises of the Texas Candy Store was authorized,

notwithstanding that part of the store premises went through to 114 Brookfield Street as this Court finds that it did. The street number (No. 108) is only a part of the description of the premises "known as the Texas Candy Store" and should not be given a controlling weight so as to restrict a search under circumstances such as these (*cf. Ferguson v. State*, 236 Md. 148, 202 A.2d 758 (1964); *People v. Watson*, 26 III, 2d 203, 186 N.E. 2d 326 (1962) *Massey v. Commonwealth of Kentucky*, 305 S.W 2d 755 (1957) any more than should a search of several premises in a multi-dwelling structure be permitted merely because a street number given in the warrant covers all of the apartments in that structure (see *e. g. People v. Rainey*, 14 N.Y. 2d 35).

With respect to the search of the defendant which resulted in the seizure of two additional policy slips, the Court finds that the arrest and search occurred after the policy slips were found in the store and that probable cause for the arrest existed inasmuch as the defendant had already claimed to be in charge of the store (Penal Law, § § 10.00 (8), 225.15, 225.20 and 225.35 (1)). The defendant has failed to prove by a preponderance of the credible evidence that the search of her person was unlawful (*People v. Merola*, 30 A.D. 2d 963).

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order, with notice of entry, upon defendant's counsel.

Dated: White Plains, N.Y.
April 2, 1969

/s/ LEONARD RUBENFELD
County Court Judge

HON. CARL A. VERGARI
District Attorney of Westchester County
Courthouse,
White Plains, N.Y. 10601

MARTIN S. FRIEDMAN, ESQ.,
Attorney for Defendant,
65 Court Street,
White Plains, N.Y. 10601.

THE COURT: The Court is going to make its findings in reverse order. The Court finds beyond a reasonable doubt that the defendant was advised of her constitutional rights, commonly called the Miranda rights, in substance, to meet the requirements set down by the Supreme Court in the Miranda decision, in any event, after she was arrested and before the conversation took place when all parties left the establishment, when the establishment was locked up by the defendant, and the Court finds also beyond a reasonable doubt that she understood her rights at that time and confirmed this understanding to Lt. Seit in accordance with this. In accordance with this finding, the conversation when the store was locked up, to wit, when the Lieutenant asked in words or substance who the defendant wanted to leave in charge of the store and she said in words or substance that she had a key, and locked the same, and other conversation at that time is clearly admissible and should not be suppressed.

The Court makes no finding as to whether or not there was a prior advising of the defendant of her rights at the time of the first conversation when it was allegedly stated by her that she was in charge of the premises. The conflict – the testimony is contradictory, whether or not that testimony was volunteered by the defendant when the warrant was shown or was said in response to a question of those in charge.

Assuming that the second be the case, this was not part of an interrogation and custody, because the defendant had no right to look or to read the search warrant unless she had some authority in the premises, and the officer had a perfect right legally to ask her who was in charge before he let her

read the search warrant.

Accordingly, as far as just this one statement that she was in charge, whether it was elicited from a question or whether it was volunteered, the testimony is somewhat inconsistent on this, the Court also finds that it was not an improper statement and should not be expressed.

MR. FRIEDMAN: May I note my exception on the record?

THE COURT: Of course.

We will recess until two o'clock.

(Whereupon an adjournment was taken.)

APPENDIX "D" –

(SAME TITLE)

BEFORE:
HONORABLE GEORGE BEISHEIM, JR.,
Supreme Court Justice.

New City, New York
September 8, 1971.

APPEARANCES:

FOR THE PEOPLE: CARL A. VERGARI, ESQ.,
District Attorney of Westchester County,
By: JEROME K. KARVER, ESQ.,
Assistant District Attorney, of Counsel.

FOR THE DEFENDANT: MESSRS. WAITZMAN & FRIEDMAN,
20 South Main Street,
New City, N.Y.
By: MARTIN S. FRIEDMAN, ESQ., of Counsel.

Also Present: JOHN R. KELLIGREW, ESQ.

Edward J. Dillon, C.S.R.,
Official Court Reporter.

THE COURT: Gentlemen, I have asked you to appear in chambers for this conference because I think we are all agreed that we should get the record settled without further delay in the above matter. Since I am sitting in Rockland County and Mr. Friedman's office is across the street from the courthouse here in New City, I think we both are grateful to Mr. Karver

for making the trip over from Westchester to expedite this matter.

As I understand it, and I ask either counsel to correct me if they believe I am incorrect in this, the stenographic record is complete in every respect except that Mrs. Armour, who was a former official stenographer for the Westchester County Court and the stenographer who took the minutes of the proceedings in the above case, apparently has lost her notes on that part of the record which was taken on Friday afternoon – have you got the date on that?

MR. FRIEDMAN: May 15th.

THE COURT: Friday afternoon, May 15, 1970; which record involved a preliminary conference in chambers between Mr. Karver, Assistant District Attorney, prosecuting the case, and Mr. Friedman, representing the defendant, before myself. At which conference also were present Mr. John Kelligrew, my law secretary, and Mrs. Roberta Fishman, the clerk of Part Three of the Westchester County Court; and, of course, the stenographer.

I understand that part of the record which Mrs. Armour has not been able to find involves the minutes of this pretrial conference in chambers, the preliminary charge given by the Court to the jury panel before the questioning of the prospective jurors began and the initial part of the voir dire when counsel were questioning jurors. As I understand it, however, there were no questions raised about the voir dire which is not an important matter in this appeal.

Now, before we go on with this hearing, I ask both

counsel, first you, Mr. Karver, and then you, Mr. Friedman, if there is anything which the Court has said on the minutes now which is contrary to the recollection of either of you or if there is anything additional which either of you would like to put on the record?

MR. KARVER: Nothing. As far as the People are concerned, the answer is no.

MR. FRIEDMAN: I didn't think there was anything inaccurate.

THE COURT: Very well.

Now, proceeding from here, I understand that you, Mr. Friedman, in your affidavit, have certain objections and exceptions to that part of the record which was not transcribed. By saying this, this has nothing whatsoever to do with and is completely without prejudice to any other objections and exceptions that you may have as far as the transcribed record. This hearing is dealing only with –

MR. FRIEDMAN: I am talking about the missing minutes only.

THE COURT: (Cont'g.) This hearing is only dealing with the missing minutes of the pretrial conference in chambers and in the preliminary charge.

MR. FRIEDMAN: That is correct, your Honor.

THE COURT: Do you wish to put on the record your exceptions, Mr. Friedman, so we have it all in one coherent

statement?

MR. FRIEDMAN: Judge, I have itemized these objections and exceptions in my moving papers and I have attached to the moving papers a photostatic copy of my handwritten notes taken at the time. Other than that, there is no way of my accurately amplifying the material that is already before the Court. If you would want me to read from the affidavit, I don't think it would serve too much purpose because it is all written there.

THE COURT: Let me look at it, please.

(Affidavit referred to, handed to the Court.)

THE COURT: The Court is directing its attention to Paragraph Ninth of Mr. Friedman's affidavit of June 4, 1971, in which Mr. Friedman stated, "The Court informed your affirmant that during the jury selection he would permit no questioning of the prospective jurors by defendant's counsel on the subject of 'reasonable doubt,' 'burden of proof' or 'presumption of innocence.' " According to the recollection of the Court, that statement is correct, with two modifications according to the Court's recollection. One of these is that the limitation was not placed upon defendant's counsel alone but was placed upon both the assistant district attorney and defendant's counsel. Is there any dispute about that limitation?

MR. KARVER: No, your Honor.

MR. FRIEDMAN: I have no independent recollection.

MR. KARVER: I remember that you precluded both of us. We were both unhappy about that.

THE COURT: And the second modification I have, and the Court says quite frankly this is a question of a hazy recollection and it is a question of more or less linguistics than anything else, I believe, because it is my general practice, that the limitation I put was that I said I would not let the jurors be questioned upon the questions of law defining any of those terms, and a word which is a favorite one of this Court in this respect was because I said I would not let the nuance of the district attorney nor of the defense attorney as to their interpretation of these legal definitions be substituted for that of the Court. But, with this minor modification, the Court will certify the record as far as this claim in Paragraph Ninth.

MR. FRIEDMAN: As far as that is concerned, your Honor, I would like to say that my recollection on that point is different than the Court's because I know, based upon my experience, if you would give me instructions not to discuss the law I would not have taken an objection. I know as a matter of practice of almost twenty years now that the province of discussing the law is solely within the province of the Court and counsel never has a right to comment on the law; so that I would not as a matter of actual practice have made any objection or taken any exception if that limitation was proposed.

THE COURT: I might say that the record shows, on page two of the minutes of May 18, 1970, that Mr. Karver asked: "If his Honor will charge you on what the law is and you were satisfied that the material facts were proven to you

beyond a reasonable doubt, you wouldn't have any hesitancy in bringing in a conviction?" And the juror answered: "No, I don't think so." That is the type of questions the Court permits but the Court does not permit, or did not permit in this case, anybody, Mr. Karver or Mr. Friedman, to give his definition of reasonable doubt to the jury. But you have noted on the record, Mr. Friedman, your recollection and the record so shows.

In certifying the record, I am finding that the record is not quite in the language which you stated.

Now, proceeding to Paragraph Eleventh, Subdivision First, the contention is, by you, Mr. Friedman: "The Court stated that it was not necessary for twelve jurors to agree in order to have a valid verdict. Objection and exception were taken." Now, I ask you is it your definite contention that you remember that the Court made such a charge, Mr. Friedman?

MR. FRIEDMAN: Judge, on my handwritten notes there appears, under Item One – this is attached to the motion that was made for objections to be taken – the statement, "12 jurors must agree or not valid verdict." This was an exception – I noted exceptions to your preliminary charge – that was made by me in my handwriting. That statement in the affidavit, or the affirmation rather, is based upon that handwritten note. At this particular moment and time, I would have no independent recollection of precise language or the precise circumstances; I am relying on my handwritten notes taken at the time. So, that is the basis of it and I can't go any further than that. I certainly am not going to stretch the truth for any client's benefit. What I have said to you is the basis for the statement and I can't make any other statement

in all honesty, so I won't.

THE COURT: The Court can say positively that the Court never instructed a jury that it was unnecessary for twelve jurors to agree to have a valid verdict in a criminal case. This Court has presided over inferior courts, village and town courts of Ossining, for over twenty years, and I have sat on the County Court for two and a half years, one and a half years approximately at the time of this trial. It is an elementary principle of law, of course, in any criminal case that there must be a unanimous verdict, and the Court finds that counsel has made an erroneous conclusion from some scratchy notes and the Court finds and certifies the record to be that the Court, in its preliminary charge, expressly instructed the jury that a unanimous verdict was necessary. This same instruction, I believe, I haven't checked it but I believe that this same instruction was given in the final charge.

I would ask you – you were present, Mr. Kelligrew and Mr. Karver – do either of you have any independent recollections of that?

MR. KARVER: I have none. I can only state that usually, from my experience, we have tried a few cases together, your practice was to tell the jurors that the unanimous verdict for both a conviction and/or an acquittal was necessary, from both sides of the coin, and that has been my recollection in the few matters that we have had together.

MR. KELLIGREW: I have no independent recollection of what you charged on the subject of unanimous verdict to the jury. However, I do believe that the usual course of regularity is

that you do charge that there has to be a unanimous verdict for a conviction, and if you charged them there was not a unanimous verdict or a five-sixth verdict, I would have pointed it out to you and called it to your attention because I was present when you made that preliminary charge.

THE COURT: Yes. I might say it is the practice of this Court to have Mr. Kelligrew present during all court charges so that if the Court inadvertently leaves out some minor obvious point which should be charged, which all courts do from time to time if the charge is not completely written, that Mr. Kelligrew be alert on those points and it is his specific function to listen carefully to the Court's charge, to call the Court's attention to any errors which he notes of such a nature. This would be one of the things which he would be expressly alerted to.

Now, Paragraph Eleventh, Subdivision Second, states: "The Court did not charge that the presumption of innocence must subsist until all of the evidence is in, the matter in the hands of the jury and the jury decides otherwise. Objection and exception were taken." It has been the practice of this Court, without one exception, on the question of the presumption of innocence charge, to read from a card which the Court has prepared. It happens at the moment that this card is in the Court's chambers in White Plains and not here but the Court will mark into the evidence of this hearing a photocopy of the card which the Court uses in every case, and did use in this case, and we will send a photostatic copy of that card to both the assistant district attorney and to Mr. Friedman for whatever the card states.

Paragraph Third. "The jury was instructed that they were required to have a justification for voting not guilty. Objection

was taken and exception granted." To the extent that this item was touched upon at all on the charge of reasonable doubt, the Court also has a card which it uses in every criminal case on the reasonable doubt charge, which also will be marked in evidence in this case and copies furnished to both attorneys. Photostats of the card will be marked in the record and photostatic copies will be given to each attorney. The Court expressly states that the Court did not state that a jury was required to have a justification for voting not guilty but used the language which was contained on the card.

MR. FRIEDMAN: May I say for the record that the language quoted is a direct quote from the handwritten notes made by myself at the time of the preliminary charge.

THE COURT: Well, the Court may add that, on the question of reasonable doubt, in this general field the Court believes that the card which will be marked into evidence will be verbatim. The Court hasn't got the card here and hasn't looked at it.

MR. FRIEDMAN: I understand that, Judge.

THE COURT: That the card which was read into evidence, or rather was read into the preliminary charge, will be the same language which the record shows was in the final charge which is in the record.

Paragraph Fourth: "The jury was instructed that police officers' testimony was weightier than that of the defendant or the defendant's witnesses. Objection was made and exception taken." The Court states that, in substance, the Court gave the same charge to the jury in the preliminary charge that it did in the final charge, to wit, that police officers' testimony was to be

considered as no more weighty or less weighty than that of any other witnesses.

Has anybody any recollection on that? First of all, do you wish to add anything? I suppose you wish to add that you took something from your notes, Mr. Friedman; is that correct?

MR. FRIEDMAN: Yes. I would say for the record that I have attached to the motion papers a photostatic copy of the notes taken by myself at the time of the conference in chambers and at the time of the preliminary charge to the jury and that this forms the essential basis for the affirmation.

THE COURT: Do you have anything to add, Mr. Karver?

MR. KARVER: I just can't imagine ever hearing the charge with respect to police officers' testimony; it seems inconceivable.

THE COURT: You mean in the manner which Mr. Friedman claims?

MR. KARVER: Yes. It seems inconceivable.

MR. KELLIGREW: Your Honor, I have no independent recollection of it. I don't believe I ever let a charge like that go by, and if you had charged that I would have had an independent recollection that you had done it.

THE COURT: You have an independent recollection that you were there and, pursuant to my instructions, there to get any possible technical or other errors in the charge.

MR. KELLIGREW: Yes, I do.

THE COURT: Paragraph Fifth. "The Court advised the jury that faulty recollection was not to be considered by the jury as to its weight or effect on the veracity of the witnesses' testimony. Objection was made and exception granted." Quite frankly, the Court does not recall its exact language in respect to this charge. The Court feels quite certain that it did not charge exactly in that language and that the Court charged substantially the same in this respect as it did in its final charge. But, in fairness to you, Mr. Friedman, my recollection and degree of positiveness on this Fifth is not quite as strong as it has been upon the other four which I have stated.

MR. FRIEDMAN: I would say that, looking at my notes in connection with both Five and Six, which were essentially about the same item, I have direct notes and I will quote from the sheet: "Facts to jury. Faulty recollection eliminated from jury consideration as to weight or effect on testimony. Object to elimination of ability to ask jurors about effect of contradiction of testimony on verdict and to —" I can't read my own note here, this word I can't make out — something "contradictions in deliberations." I can't read my own scratch on this particular thing.

THE COURT: I think the record should be clear that Fifth and Sixth are a little bit different. Fifth apparently refers to a preliminary charge and Sixth refers to directions in the pretrial chamber conference.

MR. FRIEDMAN: Yes, Sir. But this is based on — the language of those are both based and taken just about word for word from my notes at that time.

THE COURT: As far as Sixth is concerned, again the Court is not as positive on this as it was on the First, Second, Third and Fourth, but the Court does not recall and does not believe that – in fact, it is quite certain, with the knowledge which the Court believes it has, that it did not state a direction in Sixth exactly as stated in the affidavit.

MR. FRIEDMAN: I would think the missing word I had that I read I think is probably consider. That is what it looks like based on my notes.

THE COURT: We will let you put your interpretation as best as you can give it in the record.

MR. FRIEDMAN: It reads to me consider because it looks like I was kind of scratching in a hurry taking notes while the Court was talking, and I think that the last sentence reads, "To consider contradictions in deliberations."

THE COURT: Now, gentlemen, is there anything else in this record over which you are in disagreement about?

MR. FRIEDMAN: Well, other than the usual things, like mistaking which party is talking once or twice, some assertions confuse Mr. Karver and myself.

THE COURT: Can you work that out by stipulation?

MR. FRIEDMAN: I don't think it is even worth bothering about. Other than the normal stuff.

THE COURT: Well, then, I will direct that the record be certified. I take it you both stipulate to the record except as to

the alleged missing part of Friday afternoon, May 15, 1970; is that correct?

MR. FRIEDMAN: That is correct, Sir.

MR. KARVER: Yes, your Honor.

THE COURT: I certify the record on that afternoon to be as in accordance with the statements of the Court at this hearing now. I will direct the court stenographer to transcribe the minutes of this hearing as quickly as possible and to make the original minutes part of the record on appeal, with copies, of course, to be given to both counsel so that you will have an appellate record which you may proceed with your appeal on.

SWORN TO BE A TRUE AND
CORRECT COPY OF THE TRAN
OF THE MINUTES.

s/ Edward J. Dillon
Edward J. Dillon, C.S.R.,
Official Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
JUSTICE'S CHAMBERS
BAR BUILDING
WHITE PLAINS, N.Y. 10601

September 8, 1971

Martin S. Friedman, Esq.
20 South Main Street
New City, N.Y.

Re: People v. Mazie Lancaster

Dear Mr. Friedman:

Enclosed please find copies of my charge cards re the legal points of Proof Beyond A Reasonable Doubt and Presumption of Innocence which form part of both my preliminary and final charges in the above case and which cards I use without exception in every criminal charge which I make.

I am attaching the original of this letter to the motion papers which will be filed in the Westchester County Clerk's Office together with the minutes of the hearing and decision this morning when Mr. Dillon has transcribed the minutes thereof, and, of course, copies of the two charge cards will also form part of said minutes.

I think it goes without saying that my decision in chambers this morning constituted the order of the Court so that neither

you nor Mr. Karver need to prepare a formal order.

I am also sending a copy of this letter and the photocopies of the two cards to Mr. Karver.

Very truly yours,

/s/ George Beisheim, Jr.

George Beisheim, Jr.
Justice of the Supreme Court

GB/lw
Enclosures

cc: Jerome Karver, Esq.
Assistant District Attorney

You do not have to be absolutely positive that the defendant is guilty. You do not have to believe that he is guilty to such a degree that there can be no possible doubt about it. The law does not require that, because nothing in life is so absolutely certain that it can be proved that completely. But you do, if you are going to convict the defendant, have to be satisfied of his guilt in a way that leaves you without any reasonable doubt of it.

Reasonable doubt means nothing more or less than the two simple words themselves mean. You know perfectly well what a doubt is – it makes you unsure or uncertain. A possibility may exist, true, but if it is just something which may have been possible you can not help but be doubtful; if it might have been just possible, it might just as likely not have been, at all. But if your doubt is just fleeting or minimal, it is no basis for avoiding a conclusion. But a reasonable doubt goes a good deal further. It is an uncertainty for which you can give what appears to be a sound reason. It is a good deal more than a mere possibility. If such a reasonable doubt remains after all of the proof has been given, the People have not established guilt under our law.

Suppose, in delibarating, you say: "Well, I think he is guilty, but I have some doubt about it." (Of course, you understand that I do not thereby indicate that I expect this will happen in the jury room; I am merely giving this as an example and an illustration, to make the meaning of the technical expression used more completely understandable.) Suppose, then, one of your fellow jurors responded: "A doubt? What is the reason for that doubt you have?" If you cannot give a sound reason, something that a reasonable man would recognize as making

sense, for that doubt, you had better disregard it if you have been otherwise convicted of guilt. But if you can express a sound reason, one based on the testimony in the case and one that seems to make sense – not a mere whim, or impulsive idea, because that would not be reasonable – then you have come up with a justification for voting "Not guilty."

Presumption of Innocence

In this case, as in every criminal trial, the defendants are presumed to be innocent unless and until the People can convince you of their guilt, or the guilt of either, according to the standards fixed by law, beyond a reasonable doubt. What that presumption means is this:

The law says you must consider these people coming before you for judgment are innocent, until such time as the prosecution has produced evidence sufficient to impel you to arrive at a verdict that they are guilty beyond a reasonable doubt. It means that none of the defendants is under the legal duty or burden of proving his or her innocence.

Evidence of facts and circumstances to justify conviction must all be consistent with and point not only to guilt of defendant, but they must be inconsistent with his innocence.

APPENDIX "E"
May 31st, 1972

PEOPLE V. LANCASTER

By Latham, Acting P.J.; Shapiro, Gulotta and Brennan, JJ.

PEOPLE & C., res. v. MAZIE LANCASTER, **ap – Judgment of the County Court, Westchester County, rendered Sept. 2, 1970, affirmed. No opinion.**

We have reviewed the order of the same court dated April 2, 1969, which after a hearing, denied defendant's motion to suppress evidence seized under a search warrant and the following decisions of said court: one rendered May 15, 1970, denying defendant's motion to suppress an admission after a hearing, and another rendered September 3, 1971, settling the record on appeal.

Latham, acting P.J., Gulotta and Brennan, JJ., concur.

Shapiro J., dissents and votes to reverse the judgment, grant defendant's motion to suppress the admission and order a new trial, with the following memorandum, in which Christ. J., concurs:

Defendant has been convicted of the crimes of promoting gambling in the second degree and possession of gambling records in the second degree. On the morning of Feb. 2, 1968, eight police officers armed with a search warrant authorizing a search of premises located at 108 Brookfield Street, White Plains, and a search of "persons present on said premises" for "paraphernalia used in connection with maintaining a policy

game and lottery," entered those premises – a candy store. The only persons present were defendant and one Charles Redd.

Police Lieutenant Seit testified at the Huntley hearing that when the officers entered the store they had a search warrant. He then "asked her [defendant] who was in charge there." Defendant replied, "I'm in charge. Let me see that search warrant." She was not advised of her rights pursuant to the requirements of Miranda v. Arizona (384 U.S. 436) until the search of the premises had been substantially completed.

Lieutenant Seit testified that at the time the officers entered the store defendant was not free to leave and that had she attempted to do so she would have been restrained. He further testified that he was aware that possession was the key element in those crimes charged under the gambling statutes with respect to policy and in this belief he was correct (see People v. Wolosky, 296 N.Y. 236; Cimmino v. State, 29 A.D. 2d 587). At the conclusion of the Huntley hearing the court held with respect to defendant's admission: "[T]his was no part of an interrogation and custody because the defendant had no right to look at or read the search warrant unless she had some authority in the premises, and the officer had a perfect right legally to ask her who was in charge before he let her read the search warrant."

I disagree. The question of whether defendant had been in charge of the premises – in which a great many gambling records had been found – was a key issue at the trial. At the trial, she claimed she had gone to the store to purchase a package of Kotex. She agreed to remain there when the proprietor said he had to go out for a minute "to go see something about his car." The necessary element of possession

was supplied only by the admission made to Lieutenant Seit. As the warrant authorized the search of all persons present in the store, it is not at all clear that defendant had no right to examine the warrant in the absence of an admission of authority. In any event, the posing of that issue begs the real question.

Defendant's admission was made in response to a police officer's question, one designed to elicit an admission as to the key element of a crime which the officers had reasonable ground to believe had been committed. The presence of eight police officers in the store would certainly have led a reasonable person to believe he had been deprived of his freedom of action in a significant way (cf. People v. Rodney P., 21 N.Y. 2d 1, 9). Under these circumstances it was improper to seek to elicit an admission before warning the persons present of their rights.

I also note an instance of improper conduct at the trial by the prosecutor. During the cross-examination of Lieutenant Seit, William Jones (one of the persons named in the search warrant) was described as a person "involved in the policy business." Thereafter, during his cross-examination of defendant the prosecutor asked whether she was a good friend of William Jones. She said he was not a good friend and that he was simply some one she knew. The prosecutor asked whether Jones had been "the guarantor on your bond when you were arrested." She said, "No," and then indicated she did not know who the guarantor had been. The people then offered the bond in evidence. Upon objection the offer was withdrawn.

During his summation the prosecutor referred to William Jones as the guarantor of defendant's bail bond. Upon objection he withdrew his comment and then proceeded to argue that it

was implausible that defendant could actually have been unaware of the identity of the guarantor.

These remarks were totally uncalled for and were an obvious attempt to prove defendant's guilt through her association with Jones.

Order on Appeal from Judgment of Conviction

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,held in Kings County on May 30, 1972

HON. HENRY J. LATHAM Acting Presiding Justice
HON. J. IRWIN SHAPIRO
HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN Associate Justices

(SAME TITLE)

In the above entitled action, the above named Mazie Lancaster, defendant in this action, having appealed to this court from a judgment of the County Court, Westchester County, rendered September 2, 1970 and on said appeal this court having reviewed an order of the same court dated April 2, 1969, which, after a hearing, denied defendant[s motion to suppress evidence seized under a search warrant and decision of said court, dated May 15, 1970 denying defendant[s motion to suppress an admission, after a hearing, and another dated September 8, 1971, settling the record on appeal; and the appeal having been submitted by Martin S. Friedman, Esq., of counsel for the appellant, and by Janet Cunard, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed. Latham, Acting P.J., Gulotta and Brennan, JJ.,

concur. Shapiro and Christ, JJ., dissent and vote to reverse the judgment. Grant defendant's motion to suppress the admission, and order a new trial, with dissenting memorandum by Shapiro, J., in which Christ, J., concurs.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

APPENDIX "F" – Certificate Denying Leave

BEFORE: HON. ADRIAN P. BURKE, Associate Judge

(SAME TITLE)

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York, New York
August 21, 1972

s/ Adrian P. Burke

Associate Judge

***Description of Order: Order of Appellate Division, Second Department dated affirming the judgment of conviction rendered on September 2, 1970 by the County Court, Westchester County.**

EXHIBIT "G" –

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 27, 1972

HON. HENRY J. LATHAM Acting Presiding Justice
HON. J. IRWIN SHAPIRO
HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN Associate Justices

(SAME TITLE)

In the above entitled cause, the above named Mazie Lancaster, defendant, having appealed to this court from a judgment of the County Court, Westchester County, rendered September 2, 1970; this court by order dated May 30, 1972 having affirmed said judgment; and appellant having moved to amend order and remittitur on said appeal, to continue appellant on bail pursuant to the Certificate of Reasonable Doubt pending determination of a petition for a Writ of Certiorari to the United States Supreme Court;

NOW, upon the papers filed in support of said motion and in opposition thereto; the motion having been duly submitted and due deliberation having been had thereon; it is:

ORDERED that the motion is hereby denied in all respects.

Enter:

IRVING N. SELKIN
Clerk

APPENDIX "H" –

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 27, 1972.

HON. SAMUEL RABIN, Presiding Justice
HON. JAMES D. HOPKINS
HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM Associate Justices

(SAME TITLE)

The above named defendant, having been at liberty (during the pendency of his appeal from a judgment of the County Court, Westchester County, rendered September 2, 1970) as the result of an order issued by Hon. Robert E. Dempsey, Justice of the Supreme Court, Westchester County, dated November 9, 1970, and this court, having affirmed said judgment by order dated May 30, 1972, this court now issues this certificate, pursuant to subdivision 5 of section 460.50 of the Criminal Procedure Law, remitting the case to the County Court, Westchester County, which court must, upon at least two days notice to the defendant, his surety and his attorney, promptly direct the defendant to surrender himself to the said court in order that execution of the judgment be commenced or resumed, and if necessary the said court may issue a bench warrant to secure his appearance.

IRVING N. SELKIN

Irving N. Selkin
Clerk of the Appellate Division
September 27, 1972 No. 3171